Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11	)	
and 13 of the Cable Television	)	
Consumer Protection and	)	MM Docket No.92-264
Competition Act of 1992	)	
	)	
Horizontal and Vertical Ownership	)	
Limits, Crossownership Limitations	)	
and Anti-Trafficking Provisions	)	

REPLY OF GTE

GTE Service Corporation ("GTE"), on behalf of the GTE Domestic Telephone Operating Companies and GTE Laboratories Incorporated, hereby responds to the comments of others in the above-captioned proceeding.

In its Comments of February 9, 1993, GTE focused on issues of ownership attribution, horizontal concentration, and crossownership between cable operators and other multichannel video programming distributors. Two of these topics are captioned for discussion below and the third is reviewed briefly at note 4.

Ownership attribution standards should be converging, not diverging.

For years, the concepts of technological and functional "convergence" in communications and telecommunications media have been reduced to rhetorical catch-phrases by contending advocates. On the one hand, conversion of sounds, signs and pictures to digital bitstreams, coupled with shifts of video transmission from over-air to wire/fiber and of voice/data transport from wire to radio, have supported calls for "parity" of regulation. On the other hand, those who fear

large industries' expansion into new information businesses -- telephone companies into video or cable operators into voice/data -- have raised alarms of monopolization of the flow of ideas, fueled by assertedly harmful cross-subsidization.

GTE believes that convergence is driven by technological and economic realities more powerful than this rhetoric of expediency. It has said so in these cable re-regulation rulemakings and in the parallel video dialtone docket.[1] Recently, influential voices have suggested that it is time to come to grips with the realities. In a letter to FCC Chairman Quello, House Communications Subcommittee Chairman Edward J. Markey, with specific reference to convergences in the telephone and cable industries, stated:

> At some point, the technology and the services become indistinguishable between the various market participants, and at that point the question becomes whether the conditions and responsibilities for each market participant should also be indistinguishable.[2]

Addressing a seminar at Fordham University Law School, Chairman Quello noted the Southwestern Bell proposal to purchase cable systems in Virginia and Maryland suburbs of Washington, areas served by another Regional Bell Operating Company, Bell Atlantic, and said: "The transaction further emphasizes the rapidly converging worlds of the telephone and cable television business." The purchase, said the speaker, "could well be the catalyst for revisiting the content ownership restrictions of the 1984 Cable Act."[3]

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[1] Reply Comments, MM Docket 92-266 (Cable Rate Regulation), February 11, 1993, 1-3; Comments, CC Docket 87-266 (Video Dialtone), February 3, 1992, 18, n.43.

[2] Letter of February 12, 1993, Page 2.

[3] Luncheon Keynote Remarks, New York Hilton and Towers, February 18, 1993, released text at 11.

The Commission can begin to choose reality over rhetoric by making more uniform the crazy quilt of ownership attribution standards, which vary markedly among broadcast, cable, telephone and other regulated information industries. The Notice (¶38) asks whether the broadcast standard at 47 C.F.R.§73.3555, limiting multiple ownerships of radio and/or TV stations in common serving areas, should apply to cable system ownership for purposes of measuring horizontal concentration.[4] These limits, however, are proposed for revision upward, from 5% and 10%, respectively, for active and passive interests, to 10% and 20%.[5]

Elsewhere, the Notice proposes to stick with 1% as the cognizable ownership interest to implement the 1992 Cable Act's ban on crossownership between cable systems and MMDS facilities, a level chosen by the Commission in a pre-statutory rulemaking aimed at fostering "wireless cable" competition to conventional cable.(¶25). On the other hand, in the telephone company-cable television crossownership rules, as modified by the video dialtone decision, ownership up to 5% was allowed but without the same tolerances that appear in the broadcast rule, Section 73.3555, for non-controlling interests in closely held businesses.[6]

Whatever the historical justification for these variances in ownership attribution standards among broadcast, cable, wireless cable and telephone

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[4] While the record supplies no reason for the Commission to abandon its tentative preference for counting homes available to be served rather than "subscribers," GTE repeats its suggestion (Comments, 2) that total homes in a franchise area -- rather than "homes passed" -- would be a better measure of horizontal concentration because it would encourage completion of the many cable serving areas now only partly constructed.

[5] *Capital Formation Proceeding,* MM Docket 92-51, 7 FCC Rcd 2654 (1992).

[6] *Second Report and Order,* CC Docket 87-266, 7 FCC Rcd 5781 (1992), modifying text and notes to 47 C.F.R.§63.54.

industries, they are increasingly suspect today as the businesses more closely come to resemble each other in technology and function. As it happens, the broadcast Capital Formation proceeding (note 5, *supra)* and the reconsideration phase of the video dialtone docket, together with this and other rulemakings implementing the 1992 Cable Act, are open and available for congruent Commission resolution. Absent strong evidence to the contrary, what is judged good for broadcast or cable ought to be right for telephone as well.

In seeking reconsideration of this aspect of the video dialtone decision, GTE and other local exchange carriers have urged a "control" standard of ownership attribution.[7] Here, some cable operators also argue for a control standard,[8] while others suggest a test falling between the broadcast limit and control.[9] This is in sharp contrast, however, to the cable industry's general position in the video dialtone proceeding, urging the Commission not to relax -- even from 1% to 5% -- the ownership restriction governing cable-telephone company crossownerships.

GTE reiterates its belief that a control standard, or at least a threshold well above 5%, should be applied uniformly to comparable ownership attribution cases. If the Commission nevertheless settles on some lower threshold for cognizable cable interests in MM92-264 and related dockets, such as MM92-265 (program access), it should adopt the same threshold for cable-telephone

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[7] Where one owner holds more than 50% of shares, a second owner's 49% holding, for example, would not constitute control. In cases where ownership is more widely distributed, a smaller holding might enable control. *See,* GTE's Petition for Reconsideration, CC Docket 87-266, October 9, 1992, 14, 15-16.

[8] NCTA at 19, Time Warner (Cravath) at 30, 37.

[9] Comcast/Cable Industries at 37, TCI at 12.

crossownership on reconsideration in the video dialtone proceeding.[10] Without making a fetish of uniformity, the FCC also should give serious consideration to aligning these outcomes with the resolution of the previously-cited broadcast rulemaking on capital formation.

Congress meant to allow cable to use MMDS and SMATV technologies, but not to co-opt them.

Time Warner, NCTA and other cable operators express general satisfaction with the FCC's proposal to fulfill the statutory MMDS crossownership ban in the 1992 Act by applying its pre-existing rules.(Notice, ¶26) As GTE has pointed out, however, (Comments, 1-2) the rules first must be conformed to the statute by making them applicable to all cable service areas, without the exemption for multiple-provider territories at 47 C.F.R.§21.912(a).

The Notice proposes to extend the MMDS crossownership restriction to cable/SMATV relationships, but fails to discuss the significant differences in statutory language and regulatory treatment applicable to MMDS and SMATV. For example, in the former case the cable operator may not "hold a license" for MMDS operation in its serving area, while in the latter the operator is prohibited from offering SMATV service "separate and apart from any franchised cable service." Perhaps the Commission's assumption of regulatory parity between the two was influenced by the common prohibitions on ownership expressed in both the Senate and Conference Reports on the legislation.[11]

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[10] At pages 3-4 of its Comments in this ownership proceeding, GTE explained why it is no longer realistic to treat cable operators as comparatively less dominant in their local markets than are telephone companies in their exchanges. *See also,* BellSouth Comments, 2.

[11] S.Rept.102-92, 102d Cong., 1st Sess., at 81; H.R.Rept.102-862, 102d Cong., 2d Sess., at 81.

Time Warner makes much of the difference in the statutory phrasing of the cable/SMATV restriction, asserting that the law does not prohibit cable operator ownership of SMATV "facilities" but merely precludes the separate offering of SMATV "service." (Fleischman & Walsh, 58-59) It would be better for the FCC to resolve now, before disputes arise, the differences between the express language in new Section 613(a)(2) and the conferees' apparent assumption that they were enacting a dual and uniform ban on MMDS and SMATV ownership by cable operators.

In any event, enforcement of the prohibitions must vary as between MMDS and SMATV, because the former is a regulated radio transmission service, 47 C.F.R.§21.900 *et seq.*, and the latter, as a satellite receive-only medium, is not.[12] Pre-licensing scrutiny of MMDS affiliations is possible, while enforcement of the cable/SMATV ban would seem to depend on *post hoc* complaint.

Both Time Warner (F & W, 67-68) and NCTA (Comments, 60-61) assert that Congress meant the cable/SMATV crossownership restriction to apply only in those portions of the total franchise area where the cable operator's system actually passes homes. GTE believes it would better accord with Congressional intent to read the statutory term "served" as coextensive with "franchised." Again, both the Senate and Conference Reports give common explanations of the purpose of the legislation that became Section 613(a)(2). This is to prohibit the cable operator's ownership of SMATV facilities in any and all areas "in which it holds a franchise for a cable system."[13]

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[12] *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C.Cir.1984).

[13] Note 11, *supra*.

A basic rule of statutory construction is to attempt to read pieces of a law sensibly as a whole.[14] The only way to make sense of the discretionary waiver provision at Section 613(a)(2)(B) is to equate the cable area served with the area franchised. If unpassed homes in a franchise area were eligible for cable-owned SMATV service, as Time Warner and NCTA claim, there would be no need for the subsection (B) waiver, whose stated purpose is "to ensure that all significant portions of a franchise area are able to obtain video programming." Under the Time Warner/NCTA reading, the waiver provision would be redundant and unneeded because cable-owned SMATV service to fill in gaps of unpassed homes would be lawful without waiver.

Of course, the foregoing interpretation would not preclude a cable operator from using SMATV facilities to reach portions of its franchise where that technology proves cost-effective. Rather, it would simply require that the use be permitted by public-interest waiver rather than by operation of law.

Given the absence of any preliminary licensing proceeding for SMATV operation, enforcement of the subsection (B) waiver requirement would allow competing MMDS, SMATV or other multichannel video programming distributors to examine the public-interest basis of the cable/SMATV crossownership request. This is important because, in a given case, what the cable operator might describe as a cost-effective buildout of his service area could constitute, for competitors, a preemptive strike against their opportunity to enter the local video market and diversify it.

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[14] *Kelly v. Robinson,* 479 U.S.36, 43 (1986), citing and quoting several prior decisions: "[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

CONCLUSION

For the reasons set forth above, the Commission should select an ownership attribution standard it can justify for as many broadcast, cable, wireless cable and telephone crossownerships as possible, and apply that standard evenhandedly in this and other proceedings where such issues are pending. The FCC also should revise its cable/MMDS ownership rules to comply with the 1992 Cable Act, and should treat cable/SMATV affiliations as outlined in the foregoing discussion.

Respectfully submitted,

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ITS ATTORNEYS

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply of GTE" have been mailed by first class United States mail, postage prepaid, on this 3rd day of March, 1993 to all parties of record.

Ann D. Berkowitz